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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| NICHOLAS M. WIGAND, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 82A01-0607-CR-308 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0512-FB-1433

**January 26, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Defendant Nicholas M. Wigand ("Wigand") appeals the denial of his Motion to Correct Erroneous Sentence. We affirm.

## Issue

Wigand raises one issue on appeal, which we restate as: Whether Wigand's sentence was facially erroneous.

## Facts and Procedural History

On August 27, 2005, Wigand became intoxicated and drove his car into a tree and a telephone pole, killing one of his passengers and seriously injuring two others. The State charged him with Causing Death When Operating a Motor Vehicle While Intoxicated, a Class B felony,[1] two counts of Causing Serious Bodily Injury When Operating a Motor Vehicle While Intoxicated, both Class C felonies,[2] Operating a Vehicle with a BAC of .08 or More, a Class D felony,[3] and Operating a Vehicle While Intoxicated, a Class D felony.[4] All of these charges were enhanced because Wigand had one previous conviction of Operating While Intoxicated[5] in 2002.

On February 22, 2006, Wigand pled guilty to the Class B felony and the two Class C felonies without recommendation. While the probable cause affidavit alleged that Wigand's

[1] Ind. Code § 9-30-5-5(A)(3).

[2] I.C. § 9-30-5-4(A)(3).

[3] I.C. § 9-30-5-1(A).

[4] I.C. § 9-30-5-2(A).

[5] I.C. § 9-30-5-3.

BAC was .14, he admitted only to being intoxicated. During the sentencing hearing, held on April 12, 2006, Wigand's attorney argued, pursuant to the sentencing statutes, that the trial court had discretion to suspend the entire sentence, seeking "some type of least drastic alternative to sentencing other than DOC." Appellant's Appendix at 69. In response, the State argued that the suspension statute,[6] and the exception for a person causing death with a BAC of .15 or greater,[7] required at least six years to be executed because Wigand's BAC was .148 one hour after the incident, and therefore that his BAC at the time of the incident would have been approximately .16. The State asked the trial court to sentence Wigand to twelve years imprisonment, with six years executed.

The trial court entered judgment of conviction on all three counts. On the Class B felony, the trial court sentenced Wigand to eight years imprisonment, with six years executed and two years suspended. The trial court sentenced him to three years imprisonment for both of the Class C felonies, with all sentences to run concurrently. In so doing, the trial court concluded that the sentencing statutes required at least six years to be executed. Regardless, however, the trial court "would not have suspended the entire sentence because" the crime resulted in death. App. at 75.

On May 15, 2006, Wigand filed his Motion to Correct Erroneous Sentence, arguing that the trial court could have suspended his entire sentence. The trial court denied his motion. Wigand now appeals.

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[6] I.C. § 35-50-2-2.

[7] I.C. § 35-50-2-2(b)(4)(R) and I.C. § 9-30-5-5.

## Discussion and Decision

A defendant may move to correct a sentence that is erroneous. Ind. Code § 35-38-1-15. Our Supreme Court has recently clarified the standard by which we review a trial court's consideration of such motions.

> While the motion to correct sentence is available as an alternate remedy, we have repeatedly cautioned that it is appropriate only when the sentence is "erroneous on its face."
>
> When claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the "facially erroneous" prerequisite should henceforth be strictly applied . . . . We therefore hold that a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.

Robinson v. State, 805 N.E.2d 783, 786-87 (Ind. 2004) (internal citations omitted) (emphasis added).

Wigand pled guilty to a Class B felony and two Class C felonies. The trial court sentenced him to eight years imprisonment for the Class B felony, and three years for each C felony, with all three sentences to run concurrently. A person can be sentenced up to twenty years for a Class B felony and up to eight years for a Class C felony. I.C. § 35-50-2-5 and -6. Therefore, the sentence is supported by statutory authority and Wigand's sentence is not facially erroneous. Pursuant to Robinson, we decline to analyze the proceedings for purposes of reviewing the trial court's denial of Wigand's Motion to Correct Erroneous Sentence.

However, as to the statutory argument underlying Wigand's Motion to Correct Erroneous Sentence, we agree that the trial court had discretion to suspend any part of his sentence. Here, the trial court suspended two of the eight years imposed for the Class B felony. A court may suspend any part of a sentence for a felony, with numerous exceptions. I.C. § 35-50-2-2(a). Where those exceptions apply, the trial court must order that at least the minimum sentence be executed. I.C. § 35-50-2-2(b). During sentencing, the parties argued the applicability of two exceptions: where the defendant has at least two prior unrelated convictions for Operating a Vehicle While Intoxicated ("OWI"), and where the defendant has a BAC of at least .15. I.C. § 35-50-2-2(b)(4)(Q), (R).[8] On appeal, however, the State now acknowledges correctly that neither applies. Indeed, Wigand had only one prior unrelated conviction for OWI, and he made no admissions regarding the level of his BAC. Accordingly, the trial court could have suspended Wigand's entire sentence.

Nevertheless, it was within the trial court's discretion to suspend all or a part of the sentence imposed. Thus, while the trial court erroneously concluded that there was no discretion to suspend due to certain statutory exceptions, the trial court indicated that due to the facts of the case, i.e. a death, even if the trial court had the discretion, the sentence would not be suspended entirely. Thus, we find no error in the sentence imposed by the trial court.

**Conclusion**

For the reasons discussed above, we conclude that the sentence is not facially erroneous.

[8] The provisions were re-designated in light of amendments enacted during the 2006 Regular Session. P.L. 151–2006.

Affirmed.

VAIDIK, J., and BARNES, J., concur.